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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

David R. McKune, Warden,
Charles Simmons, Secretary,
Kansas Department of Corrections

Petitioner,

v.

Robert G. Lile,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the revocation of correctional institution privileges violates the Fifth Amendment's privilege against self-incrimination where the inmate has no liberty interest in the lost privileges and such revocation is based upon the inmate's failure to accept responsibility for his crimes as part of a sex offender treatment program?

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OPINIONS BELOW

The September 5, 2000, decision of the United States Court of Appeals for the Tenth Circuit affirming the District Court is reported at 224 F.3d 1175, and is included in the petition appendix. The decision of the District Court granting summary judgment to respondent is reported at 24 F. Supp. 2d 1152, and is also included in the petition appendix.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Tenth Circuit issued its decision in this case on September 5, 2000, and denied the State's timely petition for rehearing and suggestion for rehearing en banc on October 24, 2000. The State filed a timely petition for a writ of *certiorari* on January 22, 2001, and this Court granted review on May 14, 2001.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part that

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

STATEMENT OF THE CASE

1. *Nature of the Suit.* The Kansas Department of Corrections employs a comprehensive system of earnable inmate privileges in order to manage the offender population and reinforce constructive behavioral changes. As part of this system, inmates work their way through privilege incentive levels in accordance with their behavior, at all times subject to reduction for disciplinary, work or recommended program infractions.

Inmate Lile, a convicted, violent sex offender, filed this suit after his prison privileges were to be reduced to Level I (from Level III) for his refusal to participate in recommended

treatment, the Sexual Abuse Treatment Program (SATP). Inmate Lile objected to the SATP's requirement that he accept responsibility for his sex crimes. He claims that the change in his prison privileges for refusing to accept responsibility in the SATP would violate his Fifth Amendment privilege against self-incrimination.

2. *Background.*

A. *Facts of Conviction.* Robert G. Lile was convicted in 1983 of the rape, aggravated sodomy, and aggravated kidnapping of a female high school student. *See State v. Lile*, 237 Kan. 210, 699 P.2d 456, 457 (Kan. 1985); *Lile v. McKune*, 45 F. Supp. 2d 1157, 1159-60 (D. Kan. 1999).

At Lile's trial, the victim testified that she had never met Lile prior to the day of the crimes. She testified that the day of the events she was on her way home from school when she saw a car stopped beside the road with the hood up. Lile, who was standing by the car, flagged her down and asked for help. He asked her to pump the brakes of the car while he was looking under the hood. He then came to the driver's door and told the victim to slide over. He pulled a gun, which turned out to be a starter's pistol, from his belt, pointed it at the victim, and ordered her to lock the passenger door. Lile then forced the victim to perform oral sex. After a few minutes, he drove her to a field where he ordered her to remove her clothes. Lile then raped her. *See Lile,* 699 P.2d at 457.

After getting away from Lile, the victim immediately returned to her school, visibly upset, and reported the incident. When Lile was arrested, the police found him in possession of the starter pistol. Although Lile argued that he had met the girl a few days before these events, and that their sexual encounters were consensual, both the Kansas Supreme Court and a federal district court easily concluded that the evidence supported Lile's convictions beyond a reasonable doubt. *See Lile*, 699 P.2d at 458 ("We have no hesitancy in holding that,

considering the entire evidentiary record in the light most favorable to the prosecution, there was sufficient evidence for the jury to find the defendant guilty beyond a reasonable doubt of rape and aggravated sodomy"); *Lile*, 45 F. Supp. 2d at 1161 ("The court finds the evidence, when viewed in the light most favorable to the prosecution, clearly is sufficient for a reasonably jury to find beyond a reasonable doubt that petitioner was guilty of the charged offenses").

In 1983, Lile also was convicted of attempted aggravated escape from custody, after he tried to escape from Lansing. *See Lile v. Simmons*, 929 P.2d 171, 172 (Kan. Ct. App. 1996).

B. *The Kansas Internal Management Policy And Procedure System.* In 1996, the Kansas prisons adopted an Internal Management Policy and Procedure system ("IMPP"). Joint Appendix ("J.A.") 47. The Kansas IMPP is designed to "implement a comprehensive system of earnable offender privileges which will provide an effective means of managing the offender population and reinforcing constructive behavioral changes in offenders." J.A. 13.

The IMPP identifies "earnable privileges"—such as television ownership, use of funds, and visitation—and the "Incentive Levels" to which those privileges are attached. *Id.* at 14-19. The Incentive Levels begin with "Intake Level," when an inmate first enters prison, and progress through Levels I, II, and III in prison, and then to Levels IV and V for post-incarceration supervision. *Id.*; *see also id.* at 51-56. The IMPP also provides for "Reductions in Level" due to various inmate infractions or misbehavior. Among the bases for a reduction in Incentive Level are "[r]efusal to participate in recommended programs . . . ." *Id.* at 19; *see also id.* at 57-58. A fold out chart of the Incentive Levels and the corresponding earnable privileges is located at page 27 of the Joint Appendix.

C. *The Kansas Sexual Abuse Treatment Program.* Prison-based treatment for convicted sex offenders in Kansas

prisons began in 1988. The current program is referred to as the Sexual Abuse Treatment Program ("SATP"). The SATP is an 18-month long program that involves substantial counseling on a daily basis. J.A. 107. Admission to the program is voluntary, and frequently participation in the SATP is recommended for sex offenders by prison officials.

As part of the SATP, inmates are expected to complete and sign an "Admission of Responsibility" form. J.A. 31, 107.[1] Participating inmates also are required to complete a sexual history form, *id.* at 32-34, which requires them to detail all of their past offenses.

Participating inmates are informed about the limits of confidentiality in the program. In particular, they are informed that confidentiality may be compromised in six specific circumstances:

1) Mandatory reporting of child abuse.
2) Court ordered release of records.
3) Information needed to protect a third party.
4) Information needed to protect participants from harming themselves or others.
5) Escape planning.
6) Inappropriate relations with staff.

J.A. 35. Although inmates are thus assured of a significant level of confidentiality, there is no legal immunity for any statements made during participation in the SATP. To the best of Kansas's knowledge, however, *no* inmate has ever been charged or prosecuted for any offense as a result of

[1] At the program's inception, the form was titled "Admission of Guilt," J.A. 30, but the form was changed to its current "Admission of Responsibility" format in 1996. *Id.* at 123-26.

participation in prison sex offender treatment during the approximately twelve years such programs have been in existence in Kansas prisons.

The SATP also uses a "Termination Prior To Completion" form that advises an inmate of the consequences of withdrawing from the SATP once begun. J.A. 37. This form requires the inmate's signature and that of a witness, to ensure that inmates fully appreciate the consequences of such a decision. *Id.*

D. *Housing And Custody Classifications/The Lansing Prison.* An inmate's housing assignment is not an earnable privilege under the IMPP. J.A. 54. Instead, housing assignments are a function of an inmate's custody classification and other factors, such as the need for access to medical facilities, the location of assigned programs, and so forth. *Id.* at 59. In the Lansing prison, where inmate Lile resides, there are maximum, medium, and minimum security sections of the prison.[2] *Id.* at 59-60. But, because housing assignments are based on a variety of factors, there are medium security inmates in the maximum security area, and minimum security inmates in the medium security area. *Id.* at 60, 62-63. There simply is no strict segregation of inmates in the medium and maximum security areas based on custody classification. Nor are privileges (i.e., Incentive Levels, such as I, II, or III) inherently tied to custody classification. Thus, inmates with a maximum security custody classification may have Level III privileges, such as personal televisions.

Violations of the IMPP rules may result in an inmate being moved from one area to another, but do not automatically

[2] The maximum and medium security units are "contiguous." J.A. 60. The minimum security unit, which houses only minimum security inmates, is on the same grounds but is physically separate from the remainder of the facility. *Id.* at 61.

change the inmate's custody classification. Thus, a medium security inmate who refused, for example, to participate in a recommended treatment program, might be moved to the maximum security area, but to a *medium* security cell within that area. J.A. 65-66.

Furthermore, the Lansing warden, David R. McKune, when asked in his deposition whether the maximum security area is more dangerous than the medium security area, responded that:

> I'm not sure there's enough differences between the two to say one is more dangerous than the other. I mean, they both have long-term, they both have violent offenders, they both have all kinds of nooks and crannies and hiding spots, and I have assaults in both of them.

J.A. 76. Similarly, when asked whether there are more murderers or dangerous offenders in maximum security, he explained that such generalizations are difficult to make, "because custody isn't just a function of your crime, it's also a function of all of the other points and some of that just is a matter of how you're adjusting, what you're doing, how much time you've got served, all those things. I mean, I have murder 1's living out in the minimum unit." *Id.* at 77. Indeed, Warden McKune repeatedly stated that the maximum security area is *not* inherently more dangerous than the medium security area. *Id.* at 76-81.

E. *Inmate Lile.* Based upon the offenses of which he was convicted, prison officials eventually recommended that inmate Lile participate in the SATP. He refused, because of the acceptance of responsibility requirement, and filed this suit, obtaining injunctive relief. Otherwise, the consequences of inmate Lile's refusal to participate would have been (under the IMPP) a reduction from Level III status to Level I, with a corresponding reduction in privileges. He also would have

been moved to a cell in the maximum security area of the prison.

3. *The District Court Proceedings.* The District Court initially granted a temporary injunction to inmate Lile, J.A. 172-79, precluding the KDOC from reducing his privilege incentive level and keeping him on the SATP waiting list. The District Court ultimately granted summary judgment to inmate Lile on his Fifth Amendment claim. Petition Appendix ("Pet. App.") 33a-54a. The District Court further ordered the injunction continued until appellate review is completed. *Id.* at 55a.

4. *The Tenth Circuit's Decision.* The Tenth Circuit affirmed the District Court. Pet. App. 3a-32a. The Tenth Circuit began its Fifth Amendment analysis by briefly addressing the incrimination component of the privilege. *Id.* at 6a-7a. The Tenth Circuit found the incrimination element of the Fifth Amendment privilege satisfied here for two reasons. First, the written sexual history form might require persons such as inmate Lile to reveal uncharged sexual offenses. *Id.* at 6a-7a. Second, completion of the Acceptance of Responsibility form could subject inmates such as Lile to perjury charges for having maintained their innocence at trial. *Id.* at 7a.

The Tenth Circuit then addressed the "compulsion" element of the privilege. The court began with an examination of the adverse consequences to an inmate for refusing to accept responsibility or to provide a written sexual history. Observing that inmate Lile faced transfer to maximum security (from medium security) if he failed to comply with the SATP requirements, the court noted that such a "transfer would restrict [inmate Lile's] privileges." Pet. App. 10a.

> Specifically, he [inmate Lile] would lose his personal TV; he would have limited access to prison organizations and activities and would be unable to participate in the IMPP;

> he would have limited access to the gym and yard area; there would be a substantial reduction in the amount of money he could spend in the canteen per pay period, from $140 per payroll . . . to $20 per payroll . . .; he would receive a reduction in pay and intake property; and he would have substantially restricted visitation privileges.

Id.

The Tenth Circuit, however, correctly recognized that Lile would not be denied parole nor lose any good time credits (or the opportunity to earn such credits) because he refused to participate in the SATP. Pet. App. 10a-13a. In other words, his *sentence* would be unchanged. The Tenth Circuit thus concluded that the only adverse consequences inmate Lile would suffer for refusing to participate in the SATP would be "transfer to maximum security prison and the resulting loss of privileges." *Id.* at 13a. According to the court, "[t]he critical question, then, is whether the State's imposition of these consequences in response to [inmate Lile's] invocation of his Fifth Amendment right against self-incrimination constitutes impermissible coercion." *Id.*

In resolving the compulsion issue, the Tenth Circuit opined that "[t]here is no single test or factor that is dispositive, so we begin by examining Defendants' arguments." Pet. App. 13a. The court first addressed the argument that there is no compulsion here because inmate Lile's loss of privileges implicates no protected liberty interest under *Sandin v. Conner*, 515 U.S. 472 (1995). Although recognizing that changes in an inmate's prison classification ordinarily do not deprive him of a liberty interest, the Tenth Circuit opined that "nowhere in the relevant jurisprudence does the Supreme Court even hint that an individual attempting to show a violation of his Fifth Amendment privilege must have a protected liberty interest for compulsion to occur." Pet. App. 14a. Rather, the court held that "[c]ompulsion can be established by hardships that may not be atypical and that do

not constitute enforceable liberty interests." *Id.* at 15a; *see also id.* at 17a ("It is clear that the compulsion element of a Fifth Amendment claim can be established by penalties which do not constitute a deprivation of protected liberty interests under the Due Process Clause").

The Tenth Circuit then asserted that the "next critical question is whether the consequences imposed constitute penalties that are sufficiently potent and substantial to implicate the Fifth Amendment." Pet. App. 17a-18a. Reviewing again the changes in privileges that would accompany a move from medium to maximum security (including loss of a personal TV), the Tenth Circuit concluded that "these deprivations and changes in environment are penalties sufficient to implicate the Fifth Amendment because they have substantial or potent effects on the inmate." *Id.* at 18a-19a. In reaching that conclusion, the court emphasized that a critical factor is that refusal to participate in the SATP, "standing alone," results in the loss of privileges. *Id.* at 20a.

The Tenth Circuit next considered the argument that there is no compulsion because participation in the SATP is voluntary. The court opined that the fact that the change in privileges in this case automatically followed refusal to participate in the SATP undermined the argument that participation "is truly voluntary." Pet. App. 20a. In supporting that conclusion, the Tenth Circuit distinguished *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998) (inmate invoked privilege in clemency proceeding), and *Minnesota v. Murphy*, 465 U.S. 420 (1984) (person on probation claimed privilege)—both of which found no Fifth Amendment violation or compulsion—as cases in which the person was not "punished or penalized solely for choosing to remain silent." Pet. App. 23a.

The Tenth Circuit then turned to "[t]wo additional considerations" that it asserted might be helpful in determining what constitutes compulsion. Pet. App. 23a. "The first is a

distinction between a privilege and a penalty." *Id.* Opining that such a distinction may have constitutional significance in this context, the Tenth Circuit without analysis concluded that inmate Lile's loss of privileges in this case is "properly characterized as imposing penalties." *Id.* at 25a.

The Tenth Circuit also considered "the automaticity of the penalty." Pet. App. 25a. Again, the court opined that Supreme Court decisions finding no compulsion in the context of probation, parole or clemency, all involved situations in which adverse consequences for remaining silent were not "automatic." *Id.* at 25a-26a. Thus, the court concluded that "the State has violated [inmate Lile's] Fifth Amendment right against self-incrimination." *Id.* at 27a.

Finally, *after* finding a constitutional violation, the Tenth Circuit applied the balancing test of *Turner v. Safley*, 482 U.S. 78 (1987), which requires an assessment of "whether the prison policy at issue 'is reasonably related to legitimate penological interests.'" Pet. App. 27a (quoting *Turner*). The Tenth Circuit recognized that the state has a legitimate—even compelling— interest in rehabilitating sex offenders, both for the offenders' own benefit and for the public safety. *Id.* at 28a. The court also recognized that

> [t]here is a rational connection between the policy of having prisoners admit responsibility for their offenses and disclose their sexual history in order to participate in the SATP and the legitimate governmental interest in rehabilitation of sex offenders. In fact, *most mental health experts agree* that a "sex offender must admit his guilt for treatment and rehabilitation to be effective."

Id. at 29a (internal citations omitted) (emphasis added).

Nonetheless, the Tenth Circuit concluded that the balancing of interests favors inmate Lile, because (1) "there is no evidence that [inmate Lile] has any alternative means of exercising his Fifth Amendment right," Pet. App. 30a, (2)

"there is no evidence that accommodation of the right would have any negative effect on guards, other prisoners, or prison resources," *id.*, and (3) the alternative to the policy would be to grant immunity for any statements made by the inmate. *Id.* Opining that the state could still prosecute inmate Lile for other sex crimes—but not using any statements he made in the SATP—the Tenth Circuit concluded that "the *Turner* balancing easily weighs in favor of [inmate Lile]." *Id.* at 32a.

SUMMARY OF THE ARGUMENT

There is no dispute in this case that the Kansas SATP is a legitimate, therapeutic treatment program. No evidence suggests that the Kansas SATP is a subterfuge for gathering incriminating evidence to support prosecution of inmates for previously uncharged sex offenses. Indeed, there is no evidence that any inmate has ever been charged with or prosecuted for offenses discussed or disclosed in the Kansas program.

The Kansas SATP is, however, an important component of Kansas's efforts to rehabilitate convicted sex offenders, both for their own benefit and for the protection of the public. Mental health professionals agree that acceptance of responsibility is a critical component of an effective treatment program. Thus, effective treatment is the primary justification for the Kansas SATP requirement, and that purpose is unrelated to any criminal investigative or prosecutorial purposes.

It is common—and in fact essential—that prison administrators utilize incentives to rehabilitate and manage inmate populations. Changing or withholding prison *privileges* in which an inmate has no constitutionally protected liberty interest, or subjecting an inmate to prison conditions that are not atypical, generally cannot violate the Constitution. *Sandin v. Conner*, 515 U.S. 472 (1995). There is nothing arbitrary or irrational about Kansas prison administrators

giving convicted sex offenders the choice of meaningful participation in a treatment program or the withholding of certain privileges. Thus, the choice presented to inmate Lile in this case does not amount to "compulsion" under the Fifth Amendment.

This Court's recent decisions suggest a bright-line rule for determining what amounts to unconstitutional "compulsion" in the prison context. Where, as here, (1) the inmate's *sentence* has not been increased, (2) he has not been subjected to *atypical* prison conditions, and (3) prison officials have not acted *arbitrarily or irrationally*, the State cannot have crossed that constitutional line. Indeed, this Court has held that neither (1) the threat of a reduced opportunity for clemency, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998), (2) the threat of revocation of parole, *Minnesota v. Murphy*, 465 U.S. 420 (1984), nor (3) the threat of adverse inferences being drawn at a prison disciplinary hearing, *Baxter v. Palmigiano*, 425 U.S. 308 (1976), amount to unconstitutional "compulsion."

If there is no unconstitutional "compulsion," then there is no reason the State must immunize all statements that inmates make while participating in the SATP. Nor, absent any Fifth Amendment violation, is there any reason to engage in a balancing of interests under *Turner v. Safley*, 482 U.S. 78 (1987). *Turner* does, however, stand for the fundamental proposition that federal courts must pay considerable deference to state prison regulations, particularly those which serve rehabilitative and safety purposes.

Moreover, the *Turner* balancing analysis here favors upholding the Kansas IMPP approach to an inmate's refusal to accept responsibility in the SATP. The State has a legitimate interest in making sure that inmates engage in meaningful treatment programs. The State also has a legitimate interest in the potential prosecution and punishment of those who have committed unreported sexual offenses, especially those

involving child victims. Although Kansas has yet to charge or prosecute even a single inmate as a result of participation in the SATP, the Constitution should not force the State to choose between completely immunizing the participants in the SATP, or perhaps abandoning the SATP altogether.

ARGUMENT

I. There Is No Unconstitutional Compulsion In This Prison Case

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "The [A]mendment speaks of compulsion," *United States v. Monia*, 317 U.S. 424, 427 (1943), and thus "[t]he Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege." *Fisher v. United States*, 425 U.S. 391, 397 (1976). Indeed, "[t]he Constitution does not prohibit every element which influences a [person] to make incriminating admissions. * * * The constitutional guarantee is only that the witness be not *compelled* to give self-incriminating testimony." *United States v. Washington*, 431 U.S. 181, 187-88 (1977) (emphasis added).

As a result, the "criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McGautha v. California*, 402 U.S. 183, 213 (1971) (citation omitted).[3]

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[3] For this reason, the Court repeatedly has held that plea bargaining does not violate the Fifth Amendment, even though criminal defendants may feel considerable pressure to admit guilt in order to obtain more lenient

The threshold question, then, is whether inmate Lile has been subjected to unconstitutional "compulsion" intended to force him to waive his Fifth Amendment rights and incriminate himself. That inquiry necessarily must take into account the *context* in which inmate Lile's claim arises: he is a convicted, incarcerated sex offender asserting the privilege in order to avoid having to comply with an indisputably valid, prison treatment program requirement. Importantly, inmate Lile does not come to this Court as either a free citizen nor an innocent man, and that distinguishes his situation from virtually all of the cases on which he may rely in this Court.

There is no suggestion in this case that government officials would subject inmate Lile to physical or mental abuse or other mistreatment in order to force a "confession" from him. Nor is there any suggestion that the acceptance of responsibility requirement of the Kansas SATP is a subterfuge for obtaining incriminating evidence against inmates as part of ongoing criminal investigations or in preparation for possible future prosecutions. Indeed, there is no dispute that acceptance of responsibility is critical to any hope of successful treatment for sex offenders such as Lile. *See, e.g.*, J.A. 107 (uncontroverted testimony of sex offender therapist Barbara Owens that "[a] person with sexual offending behavior needs to take responsibility for that sexual offending behavior and be accountable for those offensive behaviors").

Thus, as demonstrated below, the circumstances presented here simply do not raise "the evils at which [the Fifth Amendment privilege] was to strike." *Michigan v. Tucker*, 417 U.S. 433, 440 (1974).

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treatment. *See, e.g., Brady v. United States*, 397 U.S. 742, 751 (1970); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *Corbitt v. New Jersey*, 439 U.S. 212, 218-19 (1978).

A. The Touchstone For Unconstitutional Compulsion In The Prison Setting Is The Imposition Of Atypical Hardships

1. *Atypical Hardships And "Compulsion."* In *Sandin v. Conner*, 515 U.S. 472, 484 (1995), this Court held that prison officials could place a prisoner in disciplinary segregation for thirty days without providing procedural due process because such segregation did not impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *See also Meachum v. Fano*, 427 U.S. 215, 228 (1976) (noting that absent some state-created right, "prison officials have discretion to transfer [prisoners] for whatever reason or for no reason at all"). In other words, when an inmate has no constitutionally protected liberty interest in a particular housing level, the Constitution generally cannot be violated when that housing level is changed.

Surprisingly, the Tenth Circuit in this case found compulsion in a reduction of privileges to which that court acknowledged inmate Lile had no constitutional or statutory right, and in which he had no protected liberty interest of any kind. *See* Pet. App. 13a-14a ("[A]n inmate's prison classification ordinarily does not deprive him of liberty[] because he is not entitled to a particular degree of liberty in prison") (quoting *Templeman v. Gunter*, 16 F.3d 367, 369 (10th Cir. 1994)). In doing so, the Tenth Circuit opined that "nowhere in the relevant jurisprudence does the Supreme Court even hint that an individual attempting to show a violation of his Fifth Amendment privilege must have a protected liberty interest for compulsion to occur." Pet. App. 14a. Notably, however, the Tenth Circuit could not cite a single case from *any* court (other than the district court below)

finding compulsion in the prison setting absent the imposition of *atypical hardships*.[4]

The Tenth Circuit pointed to this Court's recent decision in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), as an example of a Fifth Amendment "compulsion" case in the prison setting in which this Court did not apply an "atypical hardship" analysis. However, *Woodard* did not involve a challenge to prison regulations in the prison setting but, rather, a challenge to a clemency procedure that operated outside prison and which had nothing to do with the management of inmates. Moreover, in *Woodard* this Court stated that, "[i]n our opinion, the procedures of the Authority do not *under any view* violate the Fifth Amendment privilege." *Id.* at 286 (emphasis added). Thus, the fact that this Court did not engage in an atypical hardships/liberty interest analysis in *Woodard*—when the claim did not involve prison regulations or a prison setting and this Court found no Fifth Amendment violation *under any view* of that provision—gives no support to the Tenth Circuit's assertion that compulsion may be found in the prison setting absent the imposition of *atypical hardships*.

The Tenth Circuit also pointed to other cases that it opined stand for the proposition that "Supreme Court precedent allows that a prisoner's confinement could violate the constitution even if it did not implicate a liberty interest or violate due process." Pet. App. 14a-15a. But this adds nothing to the analysis here because, as this Court acknowledged in *Sandin*:

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[4] *Cf. McMorrow v. Little*, 109 F.3d 432, 436 (8th Cir. 1997) ("[P]rison officials may constitutionally deny benefits to a prisoner who, by invoking his privilege against self-incrimination, refuses to make statements necessary for his rehabilitation, as long as their denial is based on the prisoner's refusal to participate in his rehabilitation and not his invocation of his privilege").

> Prisoners . . . , of course, retain other protection from arbitrary state action even within the expected conditions of confinement. They may invoke the First and Eighth Amendments and the Equal Protection Clause of the Fourteenth Amendment where appropriate, and may draw upon internal prison grievance procedures and state judicial review where available.

515 U.S. at 487 n.11.

Fundamentally, the issue in this case is whether unconstitutional "compulsion" can result from the normal incidents of prison life. There is no dispute here that (1) there has been no increase in inmate Lile's *sentence* and (2) none of the prison conditions which he would experience as a result of his refusal to participate in the SATP would be *atypical hardships*.

Although the Tenth Circuit cited *no* cases actually finding compulsion in the prison setting absent the imposition of *atypical hardships*, it of course had to acknowledge some prison cases that quite naturally linked unconstitutional compulsion to the imposition of such hardships. *See* Pet. App. 16a-17a. Importantly, the Kansas Supreme Court—which is the ultimate arbiter of Kansas law and which is very familiar with the Kansas prison system—previously addressed the atypical hardship issue and expressly rejected the inmate's argument as follows:

> The housing assignment given to an inmate, his or her custody classification, granting of parole, spending limitations at a canteen, regulation of visiting hours, withholding of good time awards, and regulation of other daily activities which are not atypical and do not pose a significant hardship within a prison, do not involve a liberty interest or violate the defendant's Fifth Amendment right by compelling him to incriminate himself and participate in SATP.

Bankes v. Simmons, 963 P.2d 412, 420 (Kan. 1998). The Tenth Circuit unconvincingly attempted to distinguish *Bankes* by opining that "[w]hile we do not necessarily disagree with the Kansas Supreme Court's determination . . . our holding instructs that the liberty analysis should not be part of a Fifth Amendment privilege case." Pet. App. 17a n.9.

To reach its erroneous conclusion in this case, the Tenth Circuit also had to ignore its own precedent. In *Chambers v. Bachicha*, 39 F.3d 1191, 1994 WL 596702 (10th Cir. 1994), that court stated that, "[a]ppellant has no right to earned time. The fact that prison officials refuse to confer a portion of the potential monthly earned time merely constitutes the denial of a privilege, and is thus not a compulsion to testify for purposes of the Fifth Amendment." *Id.* at *3. The Tenth Circuit in this case clearly recognized the implications of *Chambers*, but it avoided the consequences only by relying on the fact that *Chambers* was unpublished: "To the extent that *Chambers* may be interpreted as a rule that compulsion can occur only where one is forced to forgo a constitutional right or a liberty interest, we are not bound to follow it here." Pet. App. 16a n.8.

The Tenth Circuit had no answer to the *reasoning* of *Chambers*. But the Tenth Circuit correctly decided *Chambers*, not *Lile*. Since by definition there is no constitutional right to prison privileges, inmate Lile must meet the burden of proving that he deserves a more favorable security classification or housing assignment, something he has failed to do. *See United States v. Rylander*, 460 U.S. 752, 758 (1983) (noting that allowing silence to suffice as affirmation that one deserves a benefit, "would convert the privilege from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his").

2. *The "Penalty" Analysis*. Ultimately, the Tenth Circuit characterized the application of the IMPP regulation here as a *penalty*. Pet. App. 24a. But this was wrong. A long line of cases hold that the Fifth Amendment is not violated when a person's assertion of the privilege prevents him from establishing his entitlement to a government benefit. *See, e.g., Jenkins v. Anderson*, 447 U.S. 231, 236 (1980) ("[T]he Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights'") (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973)); *Orloff v. Willoughby*, 345 U.S. 83, 91 (1953) ("No one . . . questions or doubts [petitioner's] right to withhold facts about himself on this ground. No one believes he can be punished for doing so. But the question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a post of honor and trust. We have no hesitation in answering that question 'No.'"). The withholding of prison privileges—to which an inmate has neither a statutory nor constitutional entitlement—does not amount to a "penalty" for constitutional purposes.

The Tenth Circuit also tried to buttress its "*Sandin* analysis" by listing a number of this Court's cases finding compulsion in various penalties, "none of which are explicitly characterized as deprivations of protected liberty interests." Pet. App. 15a-16a. These so-called "penalty cases" are not without their critics: "Nothing in the historical development of the privilege suggests that threatened loss of employment was the kind of compulsion against which the amendment aimed to protect; the 'compulsions' of concern to the framers were torture, bullying and imprisonment for contempt." Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671, 707 (1968); *see also* Leonard W. Levy, *History and Judicial History: The Case of Fifth Amendment*, in *Constitutional Opinions: Aspects*

of the Bill of Rights 193, 208 (1986) ("Decisions like . . . *Garrity v. New Jersey* (1967) . . . draw no clear support from the past").

The Court should not extend the penalty cases—with their questionable historical basis, *see also* Part I.C. below—to justify a finding of compulsion in this prison setting. Rather, here constitutional "compulsion" should not be found absent the imposition of *atypical hardships* on an inmate. To the best of Kansas's knowledge, the Court has never applied these "penalty" cases to find a Fifth Amendment violation in the prison setting, and it should not do so in this case.

3. *The Constitutional Rule*. The fact that the Tenth Circuit could find compulsion in this case highlights the need for a bright line rule. The Court's previous decisions suggest such a rule: when (1) an inmate's sentence has not been increased, (2) he has not been subjected to atypical prison conditions, and (3) prison officials have not acted arbitrarily or irrationally toward the inmate, there cannot be unconstitutional "compulsion" for Fifth Amendment purposes.

Prison administrators need such clear guidance in order to implement effective, incentive-based systems of rehabilitation. A rule allowing prison administrators to utilize reasonably the naturally occurring incidents of prison life to encourage socially constructive behavior and rehabilitate inmates is consistent with this Court's precedents—and it is plain common sense.

An inmate comes to prison with no right to any particular housing level or security classification. *Meachum v. Fano*, 427 U.S. at 224 ("The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another."); Pet. App. 13a-14a ("'[A]n inmate's prison classification ordinarily does not deprive him of liberty[ ] because he is not entitled to a

particular degree of liberty in prison'") (quoting *Templeman v. Gunter*, 16 F.3d 367, 369 (10th Cir. 1994)); *Lile v. Simmons*, 929 P.2d 171, 173 (Kan. Ct. App. 1996) ("Kansas law does not create a constitutionally cognizable liberty interest in a prison inmate's movement from a higher to a lesser security status") (cited approvingly in *Bankes v. Simmons*, 963 P.2d 412, 420 (Kan. 1998)).

Prison administrators thus have constitutional leeway to grant more favorable housing and other privileges as a means of encouraging rehabilitation and preparing inmates for release. Indeed, it might be a dereliction of their duty not to do so. *See Pell v. Procunier*, 417 U.S. 817, 823 (1974) ("another paramount objective of the corrections system is the rehabilitation of those committed to its custody").

Likewise, prison administrators should be free to withhold privileges previously bestowed in order to implement a rehabilitative incentive plan, *unless* doing so deprives an inmate of some type of liberty interest. *Hewitt v. Helms*, 459 U.S. 460, 468 (1983) ("It is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence") (limited in *Sandin v. Connor*, 515 U.S. 472, 482 (1995), because its approach did not provide *enough* deference to prison officials).

The changes in privileges that inmate Lile faces in this case serve nonpunitive purposes. The IMPP necessarily recognizes the fundamental prison management and rehabilitation proposition that an inmate who refuses to participate in recommended treatment should not continue to receive the benefits reserved for those who are actively working to rejoin society as productive citizens. Those who refuse to atone for their offenses by participating in required treatment in order to minimize the risk of reoffending are not being punished for invoking their Fifth Amendment privilege; they are only

experiencing the consequences of their deliberate choice to not cooperate in their rehabilitation.[5]

Adding new layers to the *Sandin* liberty interest/atypical hardship analysis unnecessarily undermines the goals of rehabilitating inmates and protecting society.

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[5] This proposition is poignantly illustrated by an exchange between the warden of Lansing prison, David R. McKune, and one of inmate Lile's attorneys, during McKune's deposition:

Q. Okay. And you've talked about a person—an inmate's decision to enter into the SATP program and other programs as their choice, is that correct?

A. Yes.

Q. You refer to it as a choice?

A. Yes.

Q. All right. And that they must deal with the consequences if they refuse not to choose to enter the program.

A. Correct.

Q. And that's how you see the incentive level system, correct?

A. Correct.

Q. You'd admit, then, that there's a price that they have to pay for making that choice, wouldn't you?

A. There are consequences of that choice, yes.

Q. Okay. So it's not a completely free and unfettered choice, is it?

A. Are there any?

Q. But—

A. I mean, there's consequences to every choice you make in life, and there are consequences to that choice as well.

J.A. 81-82.

B. The Prison Conditions Here Do Not Amount To Unconstitutional Compulsion Under The Court's Cases

1. *Fifth Amendment Cases*. Several of the Court's cases demonstrate that unconstitutional "compulsion" in the prison setting must be limited to those circumstances involving the imposition of *atypical hardships*. Indeed, the Court frequently has refused to find unconstitutional compulsion when consequences at least as "substantial and potent" as those at issue here were imposed.

For example, in *Ohio Adult Parole Authority. v. Woodard*, 523 U.S. at 286, this Court recently held that—consistent with the Fifth Amendment—a death row inmate could be made to choose between incriminating himself or having adverse inferences drawn from his silence at his clemency interview:

> Assuming also that the Authority will draw adverse inferences from respondent's refusal to answer questions . . . we do not think that respondent's testimony at a clemency interview could be "compelled" within the meaning of the Fifth Amendment . . . . He merely faces a choice quite similar to the sorts of choices that a criminal defendant must make in the course of criminal proceedings, none of which has ever been held to violate the Fifth Amendment.

The Tenth Circuit purported to distinguish *Woodard* on the ground that "Mr. Woodard was not being punished for invoking the Fifth Amendment privilege. Rather, the clemency interview was voluntary." Pet. App. 20a-21a.

But that reasoning begs the question, which is whether Woodard had a "voluntary" choice for constitutional purposes. To say that inmate Lile was "punished" for his silence while inmate Woodard was *not* seems backward: while neither inmate's actual sentence was changed as a result of his silence, "[i]n *Woodard*, plaintiff did not face a possible loss of privileges and benefits, but rather a possible *loss of life*."

Searcy v. Simmons, 97 F. Supp. 2d 1055, 1059 (D. Kan. 2000) (emphasis added).[6] No plausible argument can be made that inmate Lile faces more serious consequences for his choice here than inmate Woodard faced in that case.

Similarly, in *Minnesota v. Murphy*, 465 U.S. 420 (1984), the Court held that the Fifth Amendment was not violated when a parolee was questioned by his parole officer about prior criminal activity. In *Murphy*, the parolee had been warned that failure to be truthful could result in revocation of parole. Moreover, the parole officer was actively seeking incriminating evidence to return the parolee to jail. Even so, the Court found no constitutional violation.

The Tenth Circuit, however, purported to distinguish *Murphy*, opining that, unlike inmate Lile, "Mr. Murphy was not punished or penalized *solely* for choosing to remain silent." Pet. App. 22a. Of course, in a sense this was true, because Mr. Murphy *did not remain silent*—he talked—and the Court upheld the use of his statements against him.

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[6] *See Woodard*, 523 U.S. at 293 (Stevens, J., concurring and dissenting opinion) ("The interest in life that is at stake in this case warrants even greater protection than the interests in liberty at stake in [the Court's prior] cases"); *Searcy v. Simmons*, 97 F. Supp. 2d at 1059 ("If such a choice is not sufficient compulsion to make incriminating statements involuntary, the application of IMPP 11-101—even in its most severe application—could hardly be sufficient"); *Reed v. McKune*, No. 98-3418, 2000 WL 1278488, at *8 (D. Kan. July 17, 2000) ("That the plaintiff's refusal to take part in the SATP triggers a reduction in incentive level status does not transform his decision not to participate into an involuntary one"); *Amen-Ra v. Dep't of Defense*, 961 F. Supp. 256, 259 (D. Kan. 1997) (describing rehabilitation program as voluntary despite the fact that "custody elevation, detail changes, and other favorable considerations" were tied to participation); *Russell v. Eaves*, 722 F. Supp. 558, 560 (E.D. Mo. 1989) (finding that inmate was free to "refuse to participate" even though denial of parole was a consequence); *Brooker v. Warden*, No. 98-466-JD, 1999 WL 813893 (D.N.H. June 22, 1999) (same).

The Tenth Circuit reasoned that Murphy just suffered "the normal consequences flowing from his confession." *Id.* But this is not a satisfactory distinction. First of all, inmate Lile is not being punished for his silence; he is facing the normal consequences of refusing to participate in a valuable rehabilitation program while in prison. Second, in *Murphy*, the state threatened to return Murphy *to prison* if he did not answer all questions put to him by his parole officer.

By comparison, in this case, inmate Lile (a prisoner currently and for the past almost twenty years), faces only a transfer to what he considers a less desirable housing assignment in a section of the prison contiguous to his current location and the loss of related privileges, such as a personal television. Moreover, the information that he is refusing to provide is directly related to his rehabilitation program, and is sought for a therapeutic purpose. The state is not actively investigating him with respect to any additional possible criminal offenses.[7]

Finally, in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), the Court held that negative inferences could be drawn from an

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[7] The Tenth Circuit also relied on a footnote in *Murphy* in which the Court opined that "a state may validly insist on answers to even incriminating questions . . . as long as it recognizes that the required answers may not be used in a criminal proceeding." 465 U.S. at 435 n.7. However, Justice White, author of the Court's opinion in *Murphy*, later cautioned that any "assumption that this Court's decision in *Minnesota v. Murphy* mandates . . . immunity from prosecution based upon incriminating statements made to a therapist . . . reflect a possible misunderstanding of [a State's] obligations under the law." *Montana v. Imlay*, 506 U.S. 5, 8 (1992) (White, J., dissenting from dismissal of writ of certiorari as improvidently granted). *Cf. McMorrow v. Little*, 109 F.3d 432, 436 (8th Cir. 1997) ("[*Minnesota v. Murphy*, 465 U.S. 420 (1984)] does not, however, overrule the Court's earlier cases that state that the government can penalize someone for refusing to cooperate on government matters, even when the person does so by invoking his privilege against self-incrimination").

inmate's silence in a prison disciplinary hearing without violating the Fifth Amendment. The Court reached that conclusion because "[d]isciplinary proceedings in state prisons . . . involve the correctional process and important state interests other than conviction for crime." *Id.* at 319. In *Baxter* the Court declared that:

> It is thus undisputed that an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board. In this respect, this case is very different from the circumstances before the Court in the *Garrity - Lefkowitz* decisions, where refusal to submit to interrogation and to waive Fifth Amendment privilege, standing alone and without regard to the other evidence, resulted in loss of employment or opportunity to contract with the State.

425 U.S. at 317-18 (referring to *Garrity v. New Jersey*, 385 U.S. 493 (1967), which held that police officers questioned concerning the alleged fixing of traffic tickets in their boroughs could not be threatened with loss of employment for refusing to answer, and *Lefkowitz v. Turley*, 414 U.S. 70 (1973), which held that a statute precluding the awarding of a government contract to any person refusing to answer questions concerning state contracts violated the Fifth Amendment).

The Tenth Circuit, however, purported to distinguish *Baxter* too, opining that "[h]ere, unlike in *Baxter*, Plaintiff's refusal to submit to the interrogation . . . standing alone, would certainly result in the [adverse consequences]." Pet. App. 19a. The Tenth Circuit's analysis, however, ignores that it is not inmate Lile's *silence alone*, but rather (1) his *conviction* of a violent, sexual offense, (2) *plus* a legitimate recommendation for participation in sex offender treatment in prison, (3) *plus* his refusal to participate in that treatment, which results in the withholding of prison privileges. Thus, the Tenth Circuit's

efforts to distinguish cases notwithstanding, this case falls within the *Woodard/Murphy/Baxter* line of cases.[8]

2. *Ex Post Facto Cases.* Because the Tenth Circuit appears to have rested its finding of "compulsion" in this case on characterizing the changing or withholding of prison privileges as the imposition of an impermissible "penalty" or "punishment" on inmate Lile, the issue here is similar to the issue raised in *ex post facto* cases.

For *ex post facto* purposes, similar to the Fifth Amendment compulsion inquiry, the critical question is whether the prison regulation "increases the penalty by which a crime is punishable." *California Dep't of Corrections v. Morales*, 514 U.S. 499, 506 (1995). And this Court has previously equated the notion of "punishment" under various constitutional provisions. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 369 (1997) ("Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims").

The Kansas SATP already has withstood *ex post facto* challenges. *See, e.g., Reed v. McKune*, No. 98-3418, 2000 WL 1278488, *6 (D. Kan. July 17, 2000) (finding "no evidence . . . that plaintiff's punishment has been increased"); *Johnston v. Simmons*, No. 97-3354, 1999 U.S. Dist. LEXIS 21891, *8-9 (D. Kan. May 26, 1999) ("While his refusal has resulted in the

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[8] *See McMorrow v. Little*, 109 F.3d at 436 ("[P]rison officials may constitutionally deny benefits to a prisoner who, by invoking his privilege against self-incrimination, refuses to make statements necessary for his rehabilitation, as long as their denial is based on the prisoner's refusal to participate in his rehabilitation and not his invocation of his privilege"); *cf. Asherman v. Meachum*, 957 F.2d 978, 982 (2d Cir. 1992) ("The fact that a public employee might face the unpleasant choice of surrendering his silence or losing his job is no bar to an adverse consequence so long as the consequence is imposed for failure to answer a relevant inquiry and not for refusal to give up a constitutional right").

loss of privileges under IMPP 11-101, this loss is not an *ex post facto* violation. Plaintiff does not allege that IMPP 11-101 affects his eligibility for parole. His sentence is therefore no different than it was before defendant applied IMPP 11-101.") (internal citations omitted); *Johnston v. Simmons*, 45 F. Supp. 2d 1220, 1224 (D. Kan. 1999) ("Courts have found that the portions of IMPP 11-101 which allow the reduction in incentive level are not *ex post facto* violations because they do not increase an inmate's punishment"); *Nemecheck v. McKune*, 941 P.2d 952, 954 (Kan. Ct. App. 1997) ("Reasonable application of a prison security classification system does not amount to increased punishment . . . .").

In addition, there are numerous cases finding no *ex post facto* violation in similar situations. *See, e.g., Dominique v. Weld*, 73 F.3d 1156, 1163 (1st Cir. 1996) ("It can be argued that the regulation increases the penalty because it subjects Dominique to a different and stricter prison regime: unless and until he successfully completes the prescribed treatment program and admits to a crime he continually has denied, he must remain confined at no less than a medium security facility and remain ineligible for privileges associated with lower security imprisonment. We conclude, however, that this change in the conditions determining the nature of his confinement while serving his sentence was an allowed alteration in the prevailing 'legal regime' rather than an 'increased penalty' for *ex post facto* purposes . . . . The change does not affect the length of Dominique's sentence or his parole options."); *see also Neal v. Shimoda*, 131 F.3d 818, 827 (9th Cir. 1997) ("[T]he treatment program is intended to be rehabilitative, not retributive"); *Brooker v. Warden*, No. 98-466, 1999 WL 813893, *7 (D.N.H. June 22, 1999) ("The addition of sexual offender programming did not necessarily lengthen the time that an inmate must spend in prison. Instead, its effect depends entirely on the prisoner's experience in the program."); *Russell v. Eaves*, 722 F. Supp. 558, 560 (E.D. Mo. 1989) ("[Missouri Sexual Offender Program] is not

penal in nature; its purpose is rehabilitative. It adds no further sentence to that which has already been imposed upon the sex offender.").

C. The Tenth Circuit's Decision Is Contrary To The History And Origins Of The Fifth Amendment

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In this case, the Tenth Circuit correctly noted that the amendment's language is "somewhat narrow." Pet. App. 5a. That court also opined that this Court has "interpreted [the amendment] broadly." *Id.* (referring to *In re Gault*, 387 U.S. 1, 50 (1967)). But in so doing, the Tenth Circuit ignored the limitation imposed by the very passage it quoted from *Gault*—that the privilege is to be "broadly applied and generously implemented *in accordance with the teaching of the history of the privilege*." 387 U.S. at 50 (emphasis added). Indeed, the Tenth Circuit engaged in *no* historical analysis in this case.

History is particularly important in this context. "[T]he privilege against self-incrimination is a specific provision of which it is peculiarly true that 'a page of history is worth a volume of logic.'" *Ullmann v. United States*, 350 U.S. 422, 438 (1956) (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)); *see also* Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* xv (2d ed., Macmillan 1986) (1968) ("[T]he courts have assured us, again and again, that our understanding of the right against compulsory self-incrimination is dependent upon history").

For purposes of this case, it is important to recognize that "the development of [the Fifth Amendment] protection was in part a response to certain historical practices, such as ecclesiastical inquisitions and the proceedings of the Star Chamber." *Andresen v. Maryland*, 427 U.S. 463, 470 (1976).

When brought before the Star Chamber, accused individuals could either take an oath to answer all questions truthfully or be whipped. Mark Berger, *Taking the Fifth: The Supreme Court and the Privilege Against Self-Incrimination* 17 (1980). Thus, a central purpose of the privilege is to ensure that government "may not be coercion prove a charge against an accused out of his own mouth." *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964). And it is certainly true that the Court "has thought the privilege necessary to prevent any 'recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality.'" *Couch v. United States*, 409 U.S. 322, 327 (1973) (quoting *Ullmann*, 350 U.S. at 428).

But, historically, the privilege protected individuals from government efforts to force them to assist in the investigation and prosecution of criminal charges against them; it did not forbid the denial of government benefits or privileges to those who chose to remain silent. In this prison case, the words of Justice Stewart remind of the narrower scope of consequences historically deemed "compulsion":

> When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a farreaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced.

Griffin v. California, 380 U.S. 609, 620 (1965) (Stewart, J., dissenting).

Withholding from inmate Lile—because of his refusal to engage in a therapeutic treatment program—privileges such as a personal television or greater access to the gym does not

even begin to approach the consequences of "incarceration, banishment, or mutilation." Indeed, the full consequences inmate Lile faces for refusing to participate in sex offender treatment are as follows:

> Specifically, he [inmate Lile] would lose his personal TV; he would have limited access to prison organizations and activities and would be unable to participate in the IMPP [the prison's Internal Management Policies and Procedures programs]; he would have limited access to the gym and yard area; there would be a substantial reduction in the amount of money he could spend in the canteen per pay period, from $140 per payroll at Level III to $20 per payroll at Level I; he would receive a reduction in pay and intake property; and he would have substantially restricted visitation privileges.

Pet. App. 10a.

Importantly, inmate Lile would not be denied parole nor lose any good time credits (nor the opportunity to earn such credits) because he refused to participate in the SATP. *Id.* at 10a-13a. Thus, his *sentence* would remain unchanged, notwithstanding his refusal to participate in the SATP.

None of these consequences are anything other than the normal incidents of prison life; as such, their imposition is not unconstitutional compulsion. *See Sandin v. Conner*, 515 U.S. at 484 (holding that prison officials could place a prisoner in disciplinary segregation for thirty days without providing procedural due process because such segregation did not impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life"); *Meachum v. Fano*, 427 U.S. at 228 *rehearing denied* (noting that absent some state-created right, "prison officials have discretion to transfer [prisoners] for whatever reason or for no reason at all").

In its analysis of the adverse consequences facing inmate Lile, the Tenth Circuit twice pointed out that prison officials noted "how much more dangerous maximum security is." Pet. App. 18a. But that proposition is both erroneous as a factual matter and irrelevant as a legal matter. First, the Lansing prison warden testified repeatedly in his deposition that he does not consider the maximum security area to be inherently more dangerous than the medium security area. J.A. 76-81. Moreover, security is a function of *both* location within the prison *and* the inmate's custody classification. *Id.* at 59, 102-04. There are medium security *inmates* located in the maximum security area of the prison (and minimum security inmates located in the medium security area) for a variety of reasons, just as there are first degree murderers located in the minimum security areas. *Id.* at 60, 62-63, 102-04.

Second, as explained above, only the imposition of atypical hardships can possibly amount to unconstitutional "compulsion" in the prison setting. In this case, there is not a shred of evidence that any of the conditions existing in Lansing's maximum security area—considered individually or in combination—are atypical hardships. Thus, because the conditions in the maximum security area of the Kansas prison are normal incidents of prison life, an inmate cannot complain of spending part or all of his incarceration there. The history of the Fifth Amendment does not suggest otherwise.

II. State Prison Regulations That Serve Rehabilitative Purposes Are Entitled To Deference From The Federal Courts

A. The Tenth Circuit's Decision Fails To Accord The Proper Respect To State Prison Regulations

This Court has emphasized that, in the prison context, "federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Sandin v. Conner*, 515 U.S. at 482. This is due

in no small part to the fact that, while "prisoners do not shed all constitutional rights at the prison gate, . . . '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" *Id.* at 485 (quoting *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 125 (1977)) (internal citation omitted); *see also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) ("We take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to 'substitute our judgment on . . . difficult and sensitive matters of institutional administration.'") (quoting *Block v. Rutherford*, 468 U.S. 576, 588 (1984)).

The significance of the prison setting in this case cannot be overstated. The impact of setting on the application of the privilege is present in the Fifth Amendment itself, which prohibits compulsion only "in any *criminal case*." U.S. Const. amend. V (emphasis added). Although the notion of a "criminal case" sometimes has been defined broadly, *see*, e.g., *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (stating that the privilege extends to any "proceeding, civil or criminal, formal or informal, where answers might incriminate [the individual] in future criminal proceedings"), setting and context are central to the inquiry:

> When confronted with a Self-Incrimination Clause challenge involving a prison sex offender treatment program, a court should look first to other similar cases involving prisoners. This is the best approach for four reasons: first, as opposed to other settings, the prison setting is usually devoid of an ongoing criminal investigation;[9]

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[9] "Historically, the privilege sprang from an abhorrence of governmental assault against the single individual accused of crime and the temptation on the part of the State to resort to the expedient of compelling incriminating evidence from one's own mouth." *Couch*, 409 U.S. at 327;

> second, prison administrative regulations have historically been given deference not accorded in other settings; third, rehabilitation constitutes a legitimate government interest in the penal setting;[10] fourth, what constitutes a penalty outside prison does not automatically constitute a penalty in prison.

Stefan J. Padfield, Comment, *Self-Incrimination and Acceptance of Responsibility in Prison Sex Offender Treatment Programs*, 49 U. Kan. L. Rev. 487, 506 (2001).

Thus, even if the Court were to conclude that the consequences inmate Lile faces in this case might amount to unconstitutional compulsion if imposed on a free citizen, the result is different in prison. "In the prison setting, refusal to verbalize acceptance of responsibility in sex offender treatment programs has been upheld as a constitutionally valid reason to deny all of the following: admission to a 'Family Reunion Program,' work release[,] less restrictive confinement, custody elevation[,] detail changes, good time credits, and parole." Padfield, 49 U. Kan. L. Rev. at 509 (citing cases).

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see also, *Lefkowitz v. Turley*, 414 U.S. at 77 ("The object of the Amendment 'was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.'") (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)).

[10] The Court has said that "since most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody . . . . It is in light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners." *Pell v. Procunier*, 417 U.S. at 823.

B. The Tenth Circuit Incorrectly Relied On The *Turner v. Safley*, 482 U.S. 78 (1987), Balancing Test

This Court has repeatedly emphasized that prison regulations are accorded a particular deference. *See, e.g., Turner v. Safley*, 482 U.S. 78 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977). Thus, in *Turner*, the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if 'prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operations.'" 482 U.S. at 89 (quoting *Jones*, 433 U.S. at 126).

The Court in *Turner* set out four "factors that are relevant in determining the reasonableness of the regulation at issue": (1) whether there is a valid, rational connection between the prison regulation or practice and a legitimate governmental interest; (2) whether the regulation or practice allows inmates an alternative means of exercising the subject constitutional right; (3) the impact of accommodation of the asserted right on guards, other inmates, and the allocation of resources generally; and (4) the absence of ready alternatives to the regulation or practice. *Id.* at 89-91.

The Tenth Circuit conceded that some deference was appropriate here, and it purported to accord deference via the *Turner* balancing test. Pet. App. 25a-32a. Unlike this Court in *Sandin v. Conner*, however, in which the deference to prison regulations resulted in finding no constitutional violation *at all*, the Tenth Circuit considered deference in this case only *after* concluding that a constitutional violation had occurred. Thus, the Tenth Circuit opined that its view of the *Turner* "balancing differs from Defendants' argument that government interest is significant in determining whether the Fifth Amendment has been violated because *we apply the*

balancing analysis only after a constitutional violation has been found." Pet. App. 26a n.12 (emphasis added). The Tenth Circuit then concluded that application of the *Turner* balancing test "easily" weighed in favor of inmate Lile. *Id.* at 32a.

The Tenth Circuit's application of the *Turner* balancing test in this case raises several questions: (1) Does *Turner* apply at all in Fifth Amendment cases? (2) If *Turner* applies, does the Court give deference to the Kansas prison regulations in the first instance in determining whether there is a constitutional violation at all, or only *after* finding a constitutional violation to determine whether the regulation is nonetheless permissible? (3) If *Turner* applies here, are all four factors appropriate to consider? The state addresses these questions in turn.

1. *Does Turner Apply To Fifth Amendment Claims?* It may be inappropriate to apply the *Turner* factors in the Fifth Amendment context. *Turner* involved claims under the First Amendment and the constitutional right to marry. Lower courts, including the Tenth Circuit, have recognized that application of the *Turner* factors to other constitutional claims may be inappropriate or problematic. *See, e.g., Michenfelder v. Sumner*, 860 F.2d 328, 331 n.1 (9th Cir. 1988) (noting that the second *Turner* factor is "much more meaningful in the first amendment context than the fourth, where the right is to be free from a particular wrong"); *Dunn v. White*, 880 F.2d 1188, 1194 n.3 (10th Cir. 1989) ("The *Turner* test appears analytically to have only limited applicability to a prisoner's fourth amendment challenge").

Moreover, it does not appear that the Court has ever applied *Turner* to a case involving the Fifth Amendment. Rather, what *Turner* represents is the fundamental proposition that prison regulations that arguably impinge on constitutional rights that free citizens would enjoy are not necessarily unconstitutional in the prison context. Indeed, *Turner* essentially is an application of the general principle of deferential review in the

particular context of prison regulations affecting First Amendment interests. *See, e.g., Foote v. Spiegel*, 995 F. Supp. 1347, 1349 n.2 (D. Utah 1998) ("[T]his court determines that the Supreme Court's decision in *Washington* [*v. Harper*, 494 U.S. 210 (1990)] only commands use of the *Turner* 'standard of review' (i.e., reasonableness instead of strict scrutiny) when assessing prisoners' or detainees' constitutional claims; it does not command the use of the *Turner* factors themselves").

Thus, all that *Turner* calls for in this context is that the regulation be reasonably related to the governmental interest at stake. Holding inmates accountable for their rehabilitation—which in the case of sex offenders demands full acceptance of responsibility—is reasonably related to the government's interests in rehabilitation and safety.

Or, to put it another way, the central and decisive inquiry in this case is whether—taking into account the prison setting and the purposes of the Kansas SATP—inmate Lile is being compelled to incriminate himself? Effectively, the deference to prison regulations that is inherent in *Turner* is subsumed in the "compulsion" inquiry, which must by necessity take careful account of the setting and context in which the Fifth Amendment claim arises.

2. *Does The Court Give Deference Before Or After Finding A Constitutional Violation?* In neither *Turner* itself nor *O'Lone v. Estate of Shabazz*, did this Court separate the finding of a constitutional violation from the required deference in First Amendment cases. Subsequently, in *Sandin v. Connor*, 515 U.S. at 482-83, a procedural due process case, this Court once again highlighted the historical deference given to state prison officials, but did so completely independent of any reference to the *Turner* balancing test.

Thus, had the Tenth Circuit properly accorded the Kansas prison regulations the required deference in determining whether there is a constitutional violation at all, that court

would never have reached the *Turner* balancing test. *See, e.g., Gilmore v. McKune*, 940 P.2d 78, 81 (Kan. Ct. App. 1997) ("Since courts should refrain from reviewing prison officials' decisions regarding [the transfer of inmates refusing to participate in sex offender treatment], the district court and this court could have summarily dismissed on that basis") (citing *Sandin*). Instead, the Tenth Circuit incorrectly found a Fifth Amendment violation without first "giving appropriate deference to the decisions of prison administrators." *Jones*, 433 U.S. at 125.

It seems illogical to say—as the Tenth Circuit essentially did—that a prison regulation violates an inmate's constitutional rights but nonetheless may be valid. What *Turner* really stands for, and what this Court's cases consistently recognize, is that prison inmates do not necessarily have the same constitutional freedoms as free citizens. Prison regulations that are reasonably related to legitimate penological objectives generally do not violate the Constitution. Ultimately, as many lower courts have recognized, *Turner* adopts a deferential standard of review for inmates' claims of constitutional violations.

3. *If Turner Applies, In What Form?* Even were this Court to conclude that the *Turner* balancing test applies in some form in Fifth Amendment cases, the Tenth Circuit's application of *Turner* in this case was improper. First, although the Tenth Circuit acknowledged that "[t]here is a rational connection between the policy of having prisoners admit responsibility for their offenses and disclose their sexual history in order to participate in the SATP and the legitimate governmental interest in rehabilitation of sex offenders," Pet. App. 28a, the court devoted only two sentences to discussing that factor and failed to give it appropriate weight. Inmate Lile is a convicted, violent sex offender who was found guilty of

rape, aggravated sodomy, and aggravated kidnapping.[11] As such, he is part of a population that poses unique challenges to prison administrators and society:

> The problem of the sex offender is an all too real one. Nearly 355,000 rapes and sexual assaults were reported in 1995. The American Professional Society on the Abuse of Children (APSAC) has noted that as many as 10-15% of boys and 20-25% of girls are victims of sexual misuse prior to the age of 18. The median age of abuse for boys is 9.9 years; for girls, 9.6. Eighty percent of psychiatric inpatients report having experienced some form of sexual abuse. Many adolescent prostitutes and runaways are victims of childhood sexual abuse. Most sex offenders have multiple victims and offend numerous times with the same victim.
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> Prison populations reflect the problem of the sex offender in society at large. In some states, as much as one third of the prison population consists of sexual offenders. Of the 60,285 prisoners serving time in state prisons for crimes against children, 42,993 of them were incarcerated for rape and sexual assault, and 25,102 of those had victims under the age of twelve. Providing treatment for sex offenders has become recognized as a legitimate state interest.
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> Without acceptance of responsibility, the key goals of treatment are stymied. Denial precludes addressing cognitive distortions, developing empathy for victims, identifying risk factors that may serve as warning signals, developing much needed social skills, and examining deviant sexual arousal. It is, therefore, no wonder that the

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[11] *See Lile v. Simmons*, 929 P.2d at 172 (further noting that "in 1983, Lile was also convicted of attempted aggravated escape from custody"); *see also Lile v. Simmons*, No. 00-3172, 2001 U.S. Dist. LEXIS 5518, *5 (D. Kan. Apr. 20, 2001).

> United States Department of Justice has identified admission of responsibility as a basic requirement for treatment and that the American Bar Association has concluded that individuals who deny responsibility are not amenable to treatment . . . . In addition, the disincentives for refusing treatment keep offenders active in treatment long enough to break through their psychological defenses that would otherwise result in their choice to terminate treatment before any positive change occurred.

Stefan J. Padfield, Comment, *Self-Incrimination and Acceptance of Responsibility in Prison Sex Offender Treatment Programs*, 49 U. Kan. L. Rev. 487, 496-99 (2001) (internal citations omitted).

In contrast to its cursory treatment of the state's interests in this case, the Tenth Circuit focused on the "obvious, easy alternative" of granting immunity to inmates participating in the SATP. Indeed, it appears that the Tenth Circuit actually rested its ultimate conclusion on this single factor: "Because granting immunity or privileging statements in no way restricts the State's interests in rehabilitation or public safety, we think the *Turner* balancing test easily weighs in favor of Plaintiff." Pet. App 32a. This ignores that

> [because] many sex offenders have multiple victims and may not be amenable to treatment, society's safety may depend on a future prosecution for a past crime. Should immunity be granted to SATP participants, the burden will be on the prosecution in any later trial to prove that its evidence did not come from program disclosures.

49 U. Kan. L. Rev., at 514-15.

At bottom, even if *Turner* applies in some form, the Tenth Circuit failed to properly weigh the interests at stake.

C. The Ability To Bestow Or Withhold Correctional Institution Privileges Is An Extremely Important Rehabilitation Tool For Prison Administrators

Prison administrators commonly rely upon the granting or withholding of prison privileges to manage inmate populations, both for rehabilitative purposes and to ensure safety within the prisons. Indeed, such authority is essential to successful, constructive prison management.

This case highlights the importance of permitting prison administrators some discretion in developing and implementing incentive programs. Indeed, as inmate Lile has amply demonstrated, if the incentives here are not valid, there is no way Kansas will obtain Lile's participation in a meaningful treatment program, unless the State is willing to sacrifice other interests, such as the possible prosecution of unknown offenses.[12]

The Court previously granted review of a similar Fifth Amendment issue in a case involving the related context of probation. At that time, one neutral *amicus* pointed out the importance of incentives for effective sex offender treatment:

> Denial is a common phenomenon in offender treatment. As treatment has become more sophisticated, methods for overcoming denial and encouraging honesty have been developed. Certain offenders continue to deny the abuse, however, despite the best efforts of therapists . . . . Efforts to provide meaningful offender treatment will be severely undermined unless offenders can be required to admit the

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[12] It is worth noting that inmate Lile has been in prison for almost 20 years. This makes it highly unlikely that he even could be prosecuted for any unknown offenses he might now disclose in a treatment program—due to statutes of limitations—and yet it demonstrates how difficult it can be for prison administrators to persuade inmates to take advantage of beneficial opportunities such as the Kansas SATP.

> abuse as a precondition to treatment, and unless failure to admit can lead to termination of treatment and revocation of probation or parole.

Brief of *Amicus Curiae* American Professional Society on the Abuse of Children Supporting Neither Party at 2, 8, in *Montana v. Imlay*, No. 91-687; *see also* Judith V. Becker & William D. Murphy, *What We Know And Do Not Know About Assessing And Treating Sex Offenders*, 4 Psychology, Pub. Pol'y & L. 116, 121-22 (1998) ("The key part of any assessment of an offender is the collection of a detailed psychosocial and psychosexual history").

Another frequent reality in the prison context is limited resources. Kansas does not have unlimited beds for incarcerated sex offenders to participate in the SATP. Instead, to some extent, Kansas prison administrators must prioritize and ration those opportunities. An inmate such as Lile should not be permitted to nonetheless drain those limited resources, by occupying a space in the program, to the detriment of other inmates who have demonstrated a willingness to engage in meaningful treatment on the program's terms, rather than only on their own terms.

The Court long has recognized the important role that acceptance of responsibility plays in rehabilitation efforts. Such acceptance demonstrates that an offender "is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." *Brady v. United States*, 397 U.S. 742, 753 (1970).

There is nothing irrational or arbitrary about denying that opportunity to inmate Lile once he has made clear that he refuses to cooperate in obtaining meaningful treatment. Thus, he would not be punished for asserting his Fifth Amendment privilege; rather, he would be denied the continuation of

certain privileges because he has demonstrated that he no longer qualifies for more lenient prison conditions.[13]

Prison administrators need a definitive answer to the question presented in this case, in order to determine how best to attempt to rehabilitate dangerous, violent sex offenders in order to improve such offenders' lives and to protect the public safety. Sex offender treatment programs have proven effective, but they will be much less so absent strong incentives for these troubled inmates to participate, and to participate in a meaningful fashion.[14] The Kansas SATP is a step in the right direction; it should not be held to violate the Constitution.

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[13] The Kansas Secretary of Corrections, Charles Simmons, made this point well in his deposition when he stated as follows:

> [I]t makes no sense to have someone who's not participating in a program taking up a bed in a setting where someone else who may be willing to participate in a program could occupy that bed and participate in a program. Inmates don't get a choice of where to live. Those assignments are made by the corrections officials, and in doing that, we have to look at the overall management responsibilities and operations that we have in making sure the department runs as best it can.

J.A. 99.

[14] Indeed, another aspect of this situation are the sex offender civil commitment statutes that the Court has addressed in recent years. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346 (1997); *Seling v. Young*, 531 U.S. 250 (2001); *Kansas v. Crane*, No. 00-957 (pending on the merits). Experience has shown that many dangerous sex offenders—for a variety of reasons—will refuse to participate in prison treatment programs absent strong incentives to do so. When these offenders fail to take advantage of such programs, the chances increase that the State may conclude that it is necessary to attempt to involuntarily commit (for residential care and treatment) some of these individuals upon their release from prison. That result might be unnecessary if sex offenders, many of whom are serving sentences of considerable length, would avail themselves of meaningful, prison treatment programs such as the Kansas SATP.

CONCLUSION

For the foregoing reasons, Kansas respectfully requests that the Court reverse the decision of the Tenth Circuit, and hold that the acceptance of responsibility requirement of the Kansas sexual abuse treatment program is constitutional.

Respectfully submitted,

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